No. 84-757 (5)

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY, and CONSOLIDATED RAIL CORPORATION,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF OF PETITIONER

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February 1, 1985

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REPLY BRIEF OF PETITIONER

Con Edison's petition, according to the Koch respondents (Koch Br. 1), "ignores the relative quality" of the several judicial findings that found that Con Edison was not grossly negligent in causing the 1977 blackout and that its conduct was at most ordinary negligence or an error in judgment.[1] The jury verdict to the contrary in *Food Pageant, Inc.* v. *Consolidated Edison Co.*, 54 N.Y.2d 167 (1981), was the first and only finding against Con Edison. The Koch respondents attempt to belittle the judicial findings because they were based on official investigative reports, which "would not be admitted into evidence under normal rules" (Koch Br. 2). They also imply that the records upon which the findings exonerating Con Edison were made were not "substantially similar to that in *Food Pageant*" (*Ibid.*).

In point of fact, the principal investigative report, N.M. Clapp's *State of New York Investigation of the New York City Blackout July 13, 1977* (January 1978) ("*Clapp Report*"), reflects an impressive factual record arguably superior to any that could be developed in the context of normal adversary proceedings.[2] The *Clapp Report* provided the script for the

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1 *Lee* v. *Consolidated Edison Co.*, 95 Misc.2d 120 (N.Y.C. Civ. Ct. N.Y. Co. 1978), *rev'd on other grounds*, 98 Misc.2d 304 (Sup. Ct. App. T. 1st Dep't 1978) (*per curiam*); *Lo Vico* v. *Consolidated Edison Co.*, 99 Misc.2d 897 (Sup. Ct. App. T. 2d Dep't 1979) (*mem.*); *Finkelstein* v. *Consoldiated Edison Co.*, N.Y.L.J., May 1, 1979, p. 13, col. 3 (Sup. Ct. App. T. 2d Dep't 1979); *Lehman* v. *Consolidated Edison Co.*, N.Y.L.J., March 25, 1980, p. 10, col. 6 (Sup. Ct. App. T. 2d Dep't 1980); *Penichet* v. *Consolidated Edison Co.*, N.Y.L.J., May 1, 1980 p. 7, col. 2 (Sup. Ct. App. T. 1st Dep't 1980).

2 On July 22, Governor Hugh L. Carey issued Executive Order No. 54, *reprinted in* 9(A) N.Y.C.R.R. § 3.54, requesting the Public Service Commission to appoint Norman M. Clapp to conduct the State's investigation of the 1977 blackout and delegating to Mr. Clapp the investigative powers of a Public Service Commissioner. *Clapp Report*, *supra*, at 2. The law firm of Cleary, Gottlieb, Steen & Hamilton was selected as general counsel, and Charles P. Alman, Jr., former Chief of

plaintiff's trial of its case in *Food Pageant*, and the *Food Pageant* record is essentially the agreement of the plaintiff's expert with the conclusions of the *Clapp Report*.

The consideration of the *Clapp Report* and the other investigative reports by the justices of the Civil Court and the Supreme Court justices who sit at Appellate Term rebuts the contention of the Koch respondents that the judicial findings in Con Edison's favor were based on such inadequate records as to be "worthless" (Koch Br. 4).

The findings in Con Edison's favor did not result from any deficiency in presentation by *pro se* plaintiffs. In *Lee, Lo Vico* and *Lehman*, the courts themselves analyzed the investigative reports. In *Lee* and *Lo Vico*, which involved claims for food spoilage, the New York State Food Merchants Association, Inc., a trade association numbering among its members the largest retail food chains in the State of New York as well as Food Pageant, Inc., appeared and filed briefs as *amicus curiae*.

The Goldstein and Gillman respondents also try to dismiss the findings in Con Edison's favor, distinguishing *State Farm Fire & Casualty Co.* v. *Century Home Components, Inc.*, 275 Or. 97, 550 P.2d 1185 (1976), on the ground that "there was no suggestion in th[at] decision that the multiple judgments there

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Power Systems Operations for the Tennessee Valley Authority, former member of the Advisory Panel of the Federal Power Commission on its investigation of the North-East Power Interruption of 1965 and Vice Chairman of the Federal Power Commission Advisory Committee on Reliability of Electric Bulk Power Supply, was retained as Technical Consultant. "Under procedural guidelines . . . patterned after the procedures of legislative investigative hearings, six full days of hearings were held, 33 witnesses were called and heard, 1,545 pages of testimony were transcribed and 50 exhibits were filed." *Id.* at 4. In addition, other agencies conducting related investigations shared their data and records, and the investigation's technical consultant made on-site personal inspection visits to Con Edison's facilities. *Ibid.* "Although the Public Service Commission . . . supplied budgetary and staff support as requested, the investigation [w]as . . . conducted independently of Commission control or direction." *Id.* at 3. The *Clapp Report* details the findings of the investigation.

involved were not of 'like judicial stature' (Gillman Br. 7; *see also* Goldstein Br. 14). In *State Farm*, however, the one judgment in favor of the defendant (which had not been reviewed by any appellate court) was based upon a more meager factual record than the two judgments in favor of plaintiffs (which had been affirmed by the high court itself), and the Oregon Supreme Court pointedly

> "decline[d] the invitation to decide which case was the better tried, in which case the evidence more truly presented the facts, and which 'full and fair opportunity' by defendant resulted in the 'correct' decision. The existence of conflicting determinations of similar issues demonstrates that different bodies can legitimately draw different conclusions. As noted previously, the application of collateral estoppel is a matter of policy, not a quest for certainty." 275 Or. at 114, 550 P.2d at 1194.

The Koch respondents also disingenuously assert that Con Edison is making an "oblique reference" to its "incentive to defend vigorously" the *Food Pageant* suit by apprising the Court of the amount of damages there in issue (Koch Br. 5). The Koch respondents are trying to deflect attention from the fact that the jury's verdict split claimed damages totalling $81,000 precisely in half and awarded the plaintiff $40,500. Such indications of compromise undermine confidence that the jury's appraisal of the gross negligence in *Food Pageant* was substantially correct. *See, e.g., Restatement (Second) of Judgments* § 29, Comment g and Illustration 7 (1982). Once a jury is convinced that the defendant has been guilty of some degree of negligence, the temptation to compensate the victim is undoubtedly great, inviting "a reciprocal relinquishment of convictions upon liability and damages in order to arrive at a verdict." *Lallo* v. *W.T. Grant Co.*, 31 A.D.2d 941, 942 (2d Dep't 1969) (*mem.*).[3]

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3 The difference between ordinary and gross negligence is, of course, a matter of degree. Under New York law, the narrow line separating the two "is oftentimes shadowy and unsatisfactory." *Dalton* v. *Hamilton Hotel Operating Co.*, 242 N.Y. 481, 487 (1926). The issue of gross

Moreover, the fact that the claim in *Food Pageant*, the jury's verdict and the ultimate judgment were small in absolute terms and particularly so in comparison with the aggregate of over $200 million in claims against Con Edison (now some $123 million in more than 300 actions) highlights the fundamental unfairness of permitting the *Food Pageant* verdict to be the ultimate determinant of Con Edison's culpability *vis-à-vis* the 1977 blackout. Justice Sandler's dissent in *Goldstein* v. *Consolidated Edison Co.*, 93 A.D.2d 589, 597, 600 (1st Dep't 1983) (56a, 59a-60a), voiced this concern, among others:

> "I have been unable to find a single reported decision anywhere in the country in which issue preclusion was sustained under circumstances remotely comparable to those here.
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> * * *
>
> "It seems to me of doubtful fairness to confront any litigant, even one as large as Consolidated Edison, with such an immense gulf between the benefit to be derived from a successful outcome in a lawsuit and the detriment to be suffered from an adverse determination. At a minimum, the presence of such a circumstance demands a very close judicial scrutiny of the first verdict to make certain that it is in fact just to give it such disproportionate consequences." (Citation omitted.)

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negligence is thus peculiarly susceptible to "varying appraisals of the facts by different juries," and the impropriety of applying collateral estoppel to issues that are "subject to varying appraisals" has often been recognized. *Divine* v. *Commissioner*, 500 F.2d 1041, 1047-1048 (2d Cir. 1974), *citing, inter alia*, *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 541 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) ("wilful misconduct" under Warsaw Convention), and *Fink* v. *Coates*, 323 F. Supp. 988, 990 (S.D.N.Y. 1971) ("tort actions involving falsity, materiality, and scienter").

CONCLUSION

The writ of certiorari should issue.

Dated: New York, New York
February 1, 1985

Respectfully submitted,

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